Editor's note: Reconsideration denied by Order dated April 1, 1998

MAURICE TANNER

IBLA 93-406 Decided December 9, 1997

Appeal from a determination of the Farmington, New Mexico, District Office, Bureau of Land Management, establishing liability for trespass damages. NM 89339.

Affirmed.

1. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads

   Deposits of humate that have commercial value as soil additives because of their chemical properties are minerals within the meaning of the mining and mineral leasing laws of the United States.

2. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads

   Where there is a dispute as to whether a mineral resource is included in a mineral reservation in a patent issued under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1994), the determination should be made in light of the use of the surface estate that Congress contemplated and the manner in which the material is extracted and used.

3. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Statutory Construction: Generally--Stock-Raising Homesteads

   Interpretations of the mineral reservation in patents issued by the United States under the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1994), must be consistent with the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that, if there are doubts, they are resolved for the Government, not against it.

4. Constitutional Law: Generally--Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads

A prerequisite to any takings claim is that the claimant have some property right that was taken. Where a patent was issued with a mineral reservation, the exercise of mineral rights reserved to the United States involves no taking of anything granted by the patent.

APPEARANCES: Mark K. Adams, Esq., and Mary K. Keleher, Esq., Albuquerque, New Mexico, for Maurice Tanner.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Maurice Tanner has appealed from a determination of the Farmington, New Mexico, District Office, Bureau of Land Management (BLM or the Bureau), rendered on March 8, 1993, in which the Bureau found that he had committed an innocent trespass by the unauthorized removal of the material "humate" from lands patented with a mineral reservation to the United States and required payment of $6,225.45 in damages therefor. Tanner was cited for violations of Departmental regulations 43 C.F.R. §§ 3602.1 and 9239.0-7, which define unauthorized use and make unauthorized removal of mineral materials a trespass, charging him with the removal of 2,075.15 tons of mineral material from the S½SW¼NE¼ sec. 10, T. 19 N., R. 6 W., New Mexico Principal Meridian, which was included in Patent No. 1066654 which had issued on October 26, 1933, under the Stock- Raising Homestead Act (SRHA), 43 U.S.C. §§ 291-301 (1970), 1/ subject to a reservation on behalf of the United States of "all the coal and other minerals."

The file indicates that Tanner extracted a small amount of humate from the subject land in 1976 under a permit issued by BLM. Sometime thereafter, Tanner sold the land to others but bought it back in November 1979. Since 1979, extraction of humate has been unauthorized by BLM. Although Tanner owns the surface estate and recognizes that the United States reserved to itself ownership of "all the coal and other minerals," he contends that "humate" is an organic substance which, like peat, should not be considered to be reserved as a mineral. Tanner has requested a hearing to present evidence on the organic nature of humate. The Bureau does not dispute that humate is organic in origin but considers it, nevertheless, to be a low grade of coal which is reserved to the United States.

1/ While the SRHA was expressly repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787, the Department had long held that it was impliedly repealed by the Taylor Grazing Act, 43 U.S.C. § 315 (1994). See United States v. Browne-Tankersley Trust, 98 IBLA 325, 326 n.2 (1987), and cases cited.

Before giving further consideration to humate's legal status as a vegetative or mineral material, it is helpful to develop a general understanding of what "humate" is. One of the standard authorities states:

> Humate, derived from weathered coal and associated carbonaceous shales and claystones, has become an important nonfuel mineral commodity in the State [of New Mexico]. Enormous reserves of the humic-acid rich material have been identified, and in 1990 there were two producing mines. * * * Humate is used chiefly as an additive in drilling muds and soil conditioners.

U.S. Department of the Interior, Bureau of Mines, 1990 Minerals Yearbook, Vol. 2, at 353.

In a brief article appearing in the October/November 1991 Energy & Mineral Newsline published by BLM, a generalized description of the humate deposits in New Mexico was provided:

> The New Mexican variety of humate can best be described as a carbonaceous mudstone or shale-like material made up of totally decomposed humus and salts of humic acids such as humic, ulmic, and fluvic acids. In northwestern New Mexico, humate is most often associated with coal in the Upper Cretaceous Menefee Formation, where humate was formed in meandering channels and floodplains in a fluvial-deltaic setting.
>
> Humate has several other uses such as in drilling muds, water soluble brown stains, and as a binder in briquets made from lignite char. Other areas of potential use of humates include oil field reclamation and capture of heavy metals in hazardous waste. However, the majority of humate produced in New Mexico is for agricultural use. Although not well understood in terms of agricultural effects, humate seems to aid plant uptake of nutrients via the acids. Humate also aids soil by increasing the water holding capacity, and acts as a buffer for alkaline soils. Microorganism growth also seems to be positively affected by the introduction of humate material.

B. Lloyd, Humates in Northwestern New Mexico (Snake Oil or Wonder Product), Energy and Minerals Newsline, October/November 1991, at 9-10.

Although the record does not contain an analysis or detailed description of the material recently excavated by Tanner in this trespass action, a Mineral Report dated September 20, 1985, was prepared for a coal and

humate trespass from three pits, and pit #1 appears to be in the same location as the pit in the instant appeal. 2/

The Mineral Report acknowledged the interchangeable usage of the terms "humate," "humates," and "humic materials" and the various definitions attributed to them, such as "carbonaceous claystone or shale rich in humic matter (completely decomposed organic matter)," and "salts of humic acids" which are "complex organic molecules that are formed by the breakdown of organic matter" and whose "exact structures are unknown * * * and extremely variable." Id.; see also Bureau of Mines, A Dictionary of Mining, Mineral, and Related Terms at 555 (1968) (hereinafter cited as Dictionary). The report also noted that the term "humate" has also been applied to a form of weathered coal called "leonardite," and the report concluded that the terms are commercially used to describe "'any material which contains an (unspecified) amount of decomposed organic matter' without regard to the lithologic and chemical distinctions defined above." (Mineral Report at 6-7.)

The report described the geologic setting of the deposit in this case as follows:

> The trespass area is located within the outcrop area of the Fruitland Formation, an Upper Cretaceous coal-bearing formation formed at the margins of the sea which lay within the San Juan Basin in late Cretaceous time. * * * [3/]
>
> The topography of the area * * * is comprised of a dip slope * * * modified by erosional forces operating preferentially on weaker (softer) rocks.
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> * * * * * * *

2/ A chronology in the report suggests that, in 1985, BLM viewed the trespass as a coal and humate trespass. The report noted that the coal in the subject lands was, at that time, held under Federal coal lease NM-2457. Although BLM at one time may have considered holding the coal lessee liable for the removal of the material, it does not appear that the lessee has ever asserted any right to mine the humate deposits and may have merely acquiesced in Tanner's operations. The Bureau apparently determined to seek damages for the humate removals from Tanner as a trespasser rather than from the lessee, and presently considers the deposit in issue a mineral material salable under the Materials Act of July 31, 1947, as amended, 30 U.S.C. § 601 et seq. (1994).

3/ The Cretaceous period is generally recognized as extending from 135 to 65 million years ago. See, e.g., Bates and Johnson, Glossary of Geology, American Geological Institute (1980) at 146. By contrast, the Carboniferous period from which the bulk of coal deposits are generally deemed to have originated dates from 345 to 280 million years ago whereas all commercial peat deposits date from the Holocene epoch with a maximum age of about 13,000 to 14,000 years. See United States Mineral Resources (1973), "Peat," C. Cameron, Geological Survey Professional Paper at 511.

> The coal with which this report is concerned formed from plant material which grew and accumulated in swamps and marshes existing along the shore during stillstands in the retreat of the Cretaceous sea. The humate apparently originated with the deposition of muds among and then over the plants growing in the marshes, resulting after lithification in the organic-rich claystones and shales (humate) commonly associated with the coals today.

(Mineral Report at 6.) In short, humate in this case is a lithified material that originated from vegetation more than 65 million years ago.

The Mineral Report also included a copy of a May 27, 1982, memorandum describing pit #1:

> Humate, coal and dirty coal appear to have been excavated and stockpiled. * * * A 6.1 ft. coal seam with thin shale partings was measured and channel sampled about 210 feet south of the pit. At the pit the seam is overlain in ascending order by a 0.1 ft. calcareous sandstone parting, 1.9 feet of dirty coal (?) and several feet of "humate."

(Mineral Report at 31.) Coal samples were taken from that pit and tested, but no humate from that particular pit was analyzed. (Mineral Report at 44, 46, 52.)

While the immediate sequence of events leading to issuance of the decision under appeal began with an initial report of unauthorized use dated October 5, 1992, we note that the Department had explored the legal status of humate deposits for a number of years previous thereto with conflicting conclusions being proffered.

In an April 23, 1971, memorandum, a United States Geological Survey (USGS) Regional Mining Supervisor concluded that humate was not leasable as coal, because it could not be used as fuel, but rather should be sold under the Materials Act. By memorandum dated April 2, 1975, the Field Solicitor concluded that humate is a reserved mineral under the SRHA, based on Solicitor's Opinion, M-36417 (February 15, 1957), which had noted that low-grade mineralized substances no longer subject to the operation of the mining laws may still fall within the reservation of coal and other minerals under the SRHA.

Notwithstanding this conclusion, however, an Assistant Solicitor's memorandum dated June 4, 1976, categorized humate as a vegetative material, as did separate memoranda dated July 14 and September 17, 1976, from BLM's Director. Thereafter, in a memorandum to BLM's New Mexico State Director dated January 28, 1977, the Field Solicitor referred to a prior BLM memorandum advising that humate was not mineral but rather vegetative material and concluded that, as such, humate was not retained under a mineral reservation.

In less than a year, this view was under renewed challenge within the Department. Thus, by letter dated October 19, 1977, the Director, USGS, advised the Associate Solicitor that, in his view, humate was properly classified as a mineral rather than a vegetative material. In reliance on this conclusion, the Associate BLM Director issued Instruction Memorandum No. 78-97 (February 24, 1978) advising all BLM State Directors that humate was to be disposed of as a type of stone under the Materials Act and that humate was not subject to location under the mining laws.

Subsequently, in a memorandum to the New Mexico State Director, dated May 1, 1979, the Field Solicitor, after recounting the history of prior consideration of the status of humate, concluded that humate was a reserved salable mineral under the SRHA, relying both on the USGS finding that the material is stone and this Board's decision in Western Nuclear, Inc., 35 IBLA 146 (1978), aff'd, 462 U.S. 36 (1983), holding that gravel is a reserved mineral. This remains the official statement of position of the Bureau and the Solicitor's Office on the status of humate. 4/

Notwithstanding the foregoing, however, we will treat the issue as a matter of first impression, since the issue has "never reached the level of administrative appeal at which authoritative departmental determinations on behalf of the Secretary are made." See Udall v. Battle Mountain Co., 385 F.2d 90, 95 (9th Cir. 1967), cert. denied, 390 U.S. 397 (1968). Thus, there are two questions to be decided. First, is humate a "mineral" within the meaning of the mining and mineral leasing and disposal laws of the United States? Second, assuming the answer to the first question is in the affirmative, was humate within the class of minerals reserved under patents issued under the SRHA?

[1] In support of his contention that material such as humate is not a reserved mineral and, indeed, not a mineral at all, Tanner relies on a discussion appearing in the leading decision construing the mineral reservation in the SRHA, Watt v. Western Nuclear, Inc., 462 U.S. 36, 53-54 (1983). In that case, the Supreme Court grappled with the question whether gravel was a mineral reserved under an SRHA patent:

> Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in

4/ We note that, while it appears that no court has directly addressed the nature of the substance, the only reported decision containing the word "humate" or "humates" which we have found involved a "Material Mining Lease" that described the form of payment as a "royalty" and identified humates as "a low grade coal useful in fertilizer production." Cal-Am Corp. v. Spence, 659 F.2d 1034, 1035 (10th Cir. 1981).

> the surface estate. * * * This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both the surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and have separate value.

(Emphasis added.) Elsewhere, the Court had declared that "[w]hile it may be necessary that a substance be inorganic to qualify as a mineral under the SRHA, it cannot be sufficient." Id. at 43. Appellant relies upon these statements and argues that humate is clearly "organic" in nature and, therefore, under the Supreme Court's analysis, not mineral in character.

Implicit in Tanner's argument is the assertion that, when the Supreme Court used the term "inorganic," the Court employed it in its technical sense. But, as we shall show, that clearly was not the case. Thus, "organic" may be technically defined as: "Being, containing, or relating to carbon compounds, especially in which hydrogen is attached to carbon whether derived from living organisms or not. Usually distinguished from inorganic or mineral." Dictionary at 774. The term "inorganic," by contrast, is defined as "applied to all substances that do not contain carbon as a constituent, also to a few others in which carbon is present in an unimportant sense, for example, metallic carbonates. Metals, rocks, minerals and a variety of earths are all inorganic." Dictionary at 580. Finally, "carbon" is defined as "a nonmetallic, chiefly tetravalent element, occurring native in two crystal systems, as diamond (isometric) and as graphite (hexagonal); also occurring as a constituent of coal, petroleum, and asphalt, of limestone and other carbonates, and of all organic compounds." Dictionary at 173.

If the Supreme Court had utilized the term "inorganic" in its technical sense to exclude substances which contained carbon as a constituent element, it would have excluded diamonds, graphite, coal, petroleum, and asphalt from the definition of "mineral" under the laws of the United States. This the Court clearly did not intend. Not only are all of these substances considered to be mineral within the meaning of the mining and mineral leasing laws of the United States, see, e.g., United States v. Bolinder, 28 IBLA 187, 198 (1976), citing 14 Op. Atty. Gen. 115 (1872) (diamonds); United States v. Niece, 77 IBLA 205 (1983) (graphite); Burke v. Southern Pacific R., 234 U.S. 669 (1914) (petroleum); Webb v. American Asphaltum Mining Co., 157 F. 203 (8th Cir. 1907) (asphalt), but all entries made and patents issued under the SRHA were expressly subject to "a reservation to the United States of all the coal and other minerals in the lands so entered and patented." 43 U.S.C. § 299 (1994). Yet, coal has, in fact, been defined as "an organic rock." See Encyclopedia Britannica, Macropaedia (1979), Vol. 4 at 790. Since it is obvious that the Court did not intend to employ the technical meaning of "inorganic" in its decision, it is necessary to explore the context in which that word was used in order to discern the meaning properly accorded to it.

The Court's initial reference to "inorganic" arose in the course of a discussion which noted that a determination of what was mineral within the meaning of the mining and mineral leasing laws could not rely on the broadest definition of "mineral," since, given the tripartite division of the physical world into animal, vegetable, and mineral, all land would be classified as mineral. Watt v. Western Nuclear, Inc., supra, at 43, citing Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526, 530 (1903). Inasmuch as this was clearly not what the mineral laws had intended, the Court observed that "[w]hile it may be necessary that a substance be inorganic to qualify as a mineral under the SRHA, it cannot be sufficient." Id. Contextually, it is clear that the term "inorganic" was used by the Court to describe substances that were neither animal nor vegetable and not in the sense that substances which contain carbon as a constituent were necessarily excluded from classification as a mineral.

Of equal significance is the fact that, immediately following this statement, the Court discussed, with approval, the decision rendered by the United States District Court in United States v. Toole, 224 F. Supp. 440 (D. Mont. 1963). The decision in Toole had held that sedge peat was not a mineral within the meaning of the mining laws of the United States. In doing so, the court touched upon a number of considerations which are relevant to the case at bar.

In Toole, the court agreed with a Government challenge of certain mining claims located for sedge peat, a name derived from "the sedge grasses which cover it in place and which make up a substantial portion of its composition." Id. at 446. The Government had alleged that this peat was not a mineral at all, but rather was primarily vegetable in nature. In supporting the Government's position, the court relied primarily on two previous decisions, one Departmental and the other judicial. Thus, the court in Toole relied on the decision in Premier Peat Moss Corporation v. United States, 147 F. Supp. 169 (S.D.N.Y. 1956), for its discussion as to the general nature of peat. That latter decision had noted that

> [i]ndubitably peat moss is of vegetable origin. It is "produced by nature from what was once vegetation, and chemically it is substantially the same as the vegetation from whence it is derived. In fact, its chief characteristic results from the fact that nature itself has arrested any substantial change which without the protection of water would otherwise have taken place. Its principal uses, too, are either agricultural or horticultural."
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> The defendants urge that peat moss is unlike any commodity produced on a farm and is more in the nature of coal. But in the case of coal, although in origin derived from vegetation, the processes of nature have converted it into a mineral. Not so in the case of peat moss. There the processes of decay have not progressed far enough to cause any substantial change in its original chemical content.

147 F. Supp. at 174 (citation omitted).

The court in Toole also relied on a decision issued by the Acting Director, BLM, in United States v. J.W. Shireman, Colorado Contest No. 44 (Apr. 26, 1957). While that decision, like Toole, had also concluded that peat was not locatable under the mining laws, it contained a Departmental analysis of the legal problems presented by the issue which clearly influenced the court's conclusion in Toole. 5/ Thus, the Acting Director noted:

> [W]hatever definition is used, it is inconceivable that the United States Mining Laws, which, except for a few minor amendments, were enacted in 1872 largely as a result of the California gold rush, were intended to apply to any substance, which, when located, was primarily vegetable or organic material. To so hold would lead to the absurd result that grasses, plants, shrubs, etc., either growing or dead, could be acquired by location under laws which historically have been applied only to inorganic substances. Admittedly, it is impossible to determine at what precise point a dead vegetable or organic substance becomes a mineral through the surrender of whatever mineral elements it possesses to the surrounding earth, the operation of nature's chemical processes upon it, the natural pressures and forces exerted upon it, and the changes wrought in it by climatic conditions over a longer period of time. But in my opinion, where a substance is still visibly organic material, not having been decomposed or changed to such an extent as to have lost most of its vegetable characteristics and identity as vegetable matter, where the analysis of it discloses only minor amounts of substances admittedly mineral, and where the use to which it is put indicates that it is still predominantly organic material, it is not a mineral and hence not subject to location.

Id. at 8 (emphasis supplied).

Since peat moss has been determined not to be a mineral while it is clear that coal is a mineral, it is helpful to briefly compare the similarities and differences between these two substances. While both are derived from organic matter, peat moss is "organic" in a way that coal is not since it has clearly not lost its "vegetable characteristics." Indeed, as noted above, economic peat deposits are no older than 14,000 years old, while many coal deposits date from the Carboniferous period, i.e., from 270 to 350 million years ago. See note 4, supra. The forces of nature which have acted on coal to produce a different substance have not altered the essential vegetable nature of peat. Indeed, it is the interruption of the normal processes of decay that results in peat formation. Finally, while peat is still clearly used as an agricultural commodity as a soil additive for

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5/ The court in Toole expressly noted, in reference to the Shireman decision that "this is the type of case where the administrative agency ordinarily is better qualified to determine the relevant issue by reason of its special competence in this field." 224 F. Supp. at 447 (citation omitted).

purposes of conserving water and improving the physical character of the soil (rather than the chemical), coal is used primarily as a fuel. 6/

Where, then, does humate figure in this equation? Humate is not a vegetative material that has undergone only slight modification. On the contrary, unlike peat moss which still retains its vegetative character, humate is "a carbonaceous mudstone or shale-like material." Unlike peat moss which dates from the present epoch (the Holocene), humate dates from the Upper Cretaceous period, i.e., at least 65 million years ago, such that the forces of nature have, indeed, had ample opportunity to act upon it and alter its original nature. And, unlike peat moss which is primarily used as an additive for improving the physical character of the soil, it seems clear that the major incentive for humate use is an alteration in the chemical character of soil by improving plant uptake of nutrients via the humic and other acids present in the humate. See, e.g., United States v. Bunkowski, 5 IBLA 102 (1972) (gypsite locatable as a soil conditioner because of its chemical effects). It seems clear from the foregoing that humate is far more akin to coal in being an "organic rock" than it is to peat moss which has retained its essential vegetable character. We conclude, therefore, that humate is a mineral within the meaning of the mining and mineral leasing laws of the United States. This, however, does not end the matter since, as noted above, whether humate is a mineral reserved under the SRHA is a separate question from whether or not it is a mineral at all. We turn now to that question.

[2] In holding gravel to be a reserved mineral under the SRHA, the Court in Western Nuclear eschewed simplistic definitions in determining the scope of the reservation, noting that the term "minerals" was "used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." Watt v. Western Nuclear, Inc., supra, at 42-43, citing Northern Pacific Railway Co. v. Soderberg, supra. The Court then looked to the purposes of the SRHA and found:

> [T]he determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated. As the Court of Appeals for the Ninth Circuit noted in United States v. Union Oil Co. of California, 549 F.2d 1271, 1274 [(9th Cir.)], cert. denied, 434 U.S. 930 (1977), "[t]he agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act." * * * See Pacific Power & Light Co., 45 I.B.L.A. 127, 134 (1980) ("Where there is a

6/ In this regard, it is instructive to note that both the Acting Director in the Shireman decision and the court in Toole differentiated sedge and moss peat from "fire peat," which both assumed was subject to location under the mining laws. See United States v. Shireman, supra, at 9; United States v. Toole, supra, at 447.

> dispute as to whether a mineral resource is included in the [SRHA] reservation, it is helpful to consider the manner in which the material is extracted and used").

Watt v. Western Nuclear, Inc., supra, at 52 (emphasis added; footnote omitted). The Court concluded:

> Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. * * * This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value.

Id. at 53-54 (emphasis added; footnote omitted). The Court noted that the gravel was not used in connection with any ranching or farming activity on the patented land. Id. at 55. Neither is the humate in this appeal.

There is no dispute that the humate involved herein is mined for commercial sale. It is deposited like a mineral and is taken from the soil and has a separate value like the gravel in Western Nuclear, the scoria in Pacific Power & Light, supra, and the sand and gravel in Browne-Tankersley Trust, 76 IBLA 48 (1983). It is not being used only on-site or as common earth. Cf. Texaco, Inc., 59 IBLA 155 (1981) (no trespass on reserved mineral estate where scoria is used no differently than common earth and the record fails to demonstrate that the deposit of scoria has commercial value independent of such use). The "manner in which it is extracted and used" does not differ from other substances classified as mineral. The fact that one of humate's commercial uses is agricultural provides no greater basis for excluding it from the scope of the reservation than for excluding other minerals used for agriculture such as phosphate, potash, gypsum, or perlite. It is both recognized as a mineral by standard authorities, see, e.g., U.S. Department of the Interior, Bureau of Mines, 1990 Minerals Yearbook, Vol. 2 at 353, and referred to as such in private commercial transactions, see Cal-Am Corp. v. Spence, supra. For all the foregoing reasons, we must conclude that humate is a mineral reserved to the United States under the SRHA.

[3] We also note that, in holding gravel to be reserved, the Court had found that its conclusion was "buttressed by 'the established rule that land grants are to be construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.' United States v. Union Pacific R. Co., 353 U.S. 112, 116 (1957)." Watt v. Western Nuclear, Inc., supra, at 60. This rule likewise supports our conclusion in the instant appeal.

[4] Appellant asserts that BLM must pay him "just compensation" if he is denied the right to mine the humate and characterizes such a denial as a "taking." See SOR at 6-8. A prerequisite to any takings claim is that the claimant have some property right that was taken. In this case, the right to the material in question was reserved to the United States and was never conveyed to Tanner. The exercise of mineral rights reserved to the United States "involves no taking of anything granted by the [homestead] patent." Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 505 (1928).

Finally, Tanner argues that equity compels reversal of BLM's decision, pointing to BLM's "varying conclusions" as to whether humate should be considered a mineral and BLM's "silence and inactivity" since issuance of the Court's decision in Western Nuclear. See SOR at 8-9. We note, however, that similarly inconsistent rulings from Department officials have appeared in the history of other SRHA litigation and did not preclude the Department from successfully asserting that a mineral was reserved. The Western Nuclear decision itself discusses the varying treatment of gravel at some length. In United States v. Union Oil Co. of California, supra, at 1279-80, the court held that geothermal resources were reserved under the SRHA but specifically referred to the contrary position taken by Solicitor Weinberg in letters issued prior to the initiation of the litigation.

The Supreme Court has provided an answer to Tanner's equitable arguments in United States v. California, 332 U.S. 19, 40 (1947):

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules [principles similar to laches, estoppel, or adverse possession] designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

(Footnote omitted.) Because we have authority to decide this matter "as fully and finally as might the Secretary," 43 C.F.R. § 4.1, our authority to consider this issue is not affected by positions previously taken by the Secretary's subordinates. See Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); see also West v. Standard Oil Co., 278 U.S. 200 (1927); Knight v. United States Land Association, 142 U.S. 161, 177 (1891); Ben Cohen (On Judicial Remand), 103 IBLA 316, 328-29, aff'd sub nom. Sahni v. Watt, Civ. No. S-83-96-HDM (D. Nev. Jan. 17, 1990), aff'd, (Jan. 14, 1991), aff'd, No. 91-15398 (9th Cir. Apr. 27, 1992). Moreover, since, as noted above, the Government classifies Tanner's action as unintentional trespass and merely seeks compensation for the value of

the mineral sold by Tanner, Tanner has not been penalized by any reliance on previous pronouncements by Departmental officials that humates were vegetative in nature and, thus, not reserved under the SRHA patent. He has merely been required to pay for that which he had no right to sell.

The Bureau has determined that Tanner removed 2,075.15 tons of material which was valued in place at $3 per ton, so that the damages for innocent trespass amounted to $6,225.45 in accordance with 43 C.F.R. § 9239.5-3. Inasmuch as Tanner has not challenged this valuation nor made an offer of specific proof tending to show that BLM's appraisal is incorrect, it is properly sustained. See Pacific Power & Light, supra, at 140.

Appellant has requested an evidentiary hearing on the organic nature of humic materials. Although an evidentiary hearing may be appropriate when an appeal presents a controverted issue of material fact, no hearing is required where the issue is purely one of law. See United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971). As the authorities quoted above illustrate, the organic nature of these deposits was not disputed. What was in dispute was whether or not humate is a mineral reserved under the SRHA. This, however, is a question of law. We note that, in holding geothermal resources were reserved under the SRHA, the court similarly found that the facts about the nature of geothermal resources necessary for a decision were not disputed and concluded that the case presented "only a question of law." United States v. Union Oil Co. of California, supra, at 1280. Accordingly, the request for an evidentiary hearing is denied. 7/

We conclude, therefore, that humates are a mineral reserved under patents issued pursuant to the SRHA and that the disposition of such mineral constitutes a trespass for which the United States is properly compensated.

7/ Appellant has also requested an opportunity to present oral argument before the Board. Appeals to the Board of Land Appeals are ordinarily decided on the basis of the administrative record and the briefs of the parties on appeal. Wyoming Independent Producers Association, 133 IBLA 65, 89 (1995). Oral argument may be granted in the discretion of the Board where it appears that clarification of the issues on appeal would be aided by the opportunity to inquire further of counsel for the parties. See 43 C.F.R. § 4.25. Inasmuch as we believe that the record provides a more than adequate basis upon which to determine the issues presented, the request for oral argument is denied. Marathon Oil Co., 128 IBLA 168, 173 (1994).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge